(1) Supreme Court, U.S.
FILED

No. 00 99 JUL 17 2000

In The
Supreme Court of the United States

IN RE: MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, ET. AL.,
Petitioner,

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI
with Appendix

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July, 2000

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64 pp

QUESTIONS PRESENTED

1. Whether or not an order denying a motion for summary judgment, the grounds of which challenge whether a person or entity's conduct falls within the provision of a federal law (20 USC §1681 et seq. [Title IX]) is a collateral order reviewable under 28 USC §1291?

2. Whether or not a refusal of the trial court to follow on-point case law of the Circuit Court of Appeals and the United States Supreme Court constitute extraordinary circumstances sufficient to grant a writ of mandamus (FRAP 21, Constitution Article III, Section 1).

TABLE OF CONTENTS

QUESTIONS PRESENTED i
TABLE OF AUTHORITIES iv
OPINION BELOW 1
JURISDICTION 1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2
STATEMENT OF THE CASE 2
REASONS FOR GRANTING THE PETITION 3

I. The decision of the District Court and the sanctioning of it by the Sixth Circuit Court of Appeals' refusal to take jurisdiction, conflicts with the Michigan Supreme Court's decision on the issue of who controls the athletic programs of the member institutions of the MHSAA. 5

II. The decision of the District Court and the sanctioning of that decision by the non-action of the Sixth Circuit Court of Appeals let stand a law of the case that has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's supervisory powers. 6

III. This is a case of national importance because of its impact on the rule of binding precedent and the implementation of 28 USC 1291 jurisdiction of the Court of Appeals. 8

A. The Opinion and Order constitute a Final Decision of the District Court And make the "law of the case." 9

B. A Colateral Order is interlocutory in Form but final in nature and creates The "Law of the Case." 12

CONCLUSION 14

APPENDICES:

APPENDIX 1: Sixth Circuit Court of Appeals Order (May 16, 2000).

APPENDIX 2: Sixth Circuit Court of Appeals Order (March 21, 2000).

APPENDIX 3: Opinion and Order of the U.S. District Court for the Western District of Michigan. (January 21, 2000).

TABLE OF AUTHORITIES

FEDERAL CASES:

Brentwood Academy v.
Tennessee Secondary School Athletic Association,
180 F. 3d 758, reh. Den. 190 F. 3d 705 (6th Cir. 1999)
Cert granted 120 S. Ct. 156 (U.S. Feb. 22, 2000)
No. 99-901 ..... 3, 8, 10

Cannon v. University of Chicago,
441 U.S. 677, 99 S. Ct. 946, 60 L.Ed.2D 560 (1979).... 6

Clemens v. Kansas,
951 F. 2d 287 (10th Cir. 1991) 12

Davis v. Monroe County Board of Education,
526 U.S. 629, 119 S.Ct. 1661,
143 L.Ed2d 831 (1999) 2, 3, 7, 13

Digital Equipment Corp. v. Desktop Direct, Inc.,
511 U.S. 863, 114 S. Ct. 1992, 1995,
128 L. Ed. 2d 842 (1994), ... 9

Firestone Tire & Rubber Co. v. Risjord,
449 U.S. 368, 376, 101 S. Ct. 669,
66 L. Ed 2d 571 (1981) 9

Johnson v. Fenkell,
520 US 911, 117 S. Ct. 1800,
138 L.Ed. 2d 108 (1997) 6

Johnson v. Jones,
515 US 304, 115 S. Ct. 2151, 2155, 132
L. Ed 2d 238 (1995) 9, 13

Mitchell v. Forsyth,
472 U.S. 511, 526, 105 S. Ct. 2806,
86 L. Ed. 2d 411 (1985) 11, 13

National Collegiate Athletic Assn. v. Smith,
525 U.S. 459, 119 S. Ct. 924,
142 L. Ed. 2d 929 (1999) 7

Puerto Rico Aqueduct & Sewer Authority v.
Metcalf & Eddy, Inc., 506 U.S. 139, 113 S. Ct. 684,
687-689, 121 L. Ed. 2d 605 (1993) 11

Sault Ste. Marie Tribe of Chippewa Indians, et al. v.
State of Michigan,
5 F. 3d 147, 149 (6th Cir. 1993) 11, 12, 13

Soper v. Hoben,
195 F. 3d 845 (6th Cir. 1999)1985) 3, 8, 14

Swint v. Chambers of County Commission, et al.,
514 U.S. 35, 42, 115 S. Ct. 1203,
131 L. Ed. 2d 60 (1995) 11

U.S. Department of Transportation v.
Paralyzed Veterans of America,
477 U.S. 597, 106 S. Ct. 2705,
91 L. Ed. 2d 494 (1986) 7

Wedding v. University of Toledo,
89 F. 3d 316, 318 (6th Cir. 1996) 9, 12, 13

STATE CASES:

Kirby v. The MHSAA,
459 Mich 23 (1998) 585 NW 2d 290 5

FEDERAL STATUTES:

20 USC §1681 ..... 2, 4
20 USC §1682 2
28 USC §1254(1) 1
28 USC §1291 ..... 2, 9, 13, 14
42 USC §1983 ..... 2, 3, 10, 11
Supreme Court Rule 10 (a) 4

PETITION FOR WRIT OF CERTIORARI

Petitioner Michigan High School Athletic Association, Inc. and its officers and Representative Council Members respectfully petition for Writ of Certiorari to review the Judgment Orders of the United States Court of Appeals for the Sixth Circuit Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 2) was entered on March 21, 2000 and is not reported. The order of the Circuit Court of Appeals denying the Petition for Rehearing En Banc was entered on May 16, 2000 and is not reported. The Opinion of the United States District Court for the Western District of Michigan denying Petitioner's Motion For Summary Judgment was issued January 21, 2000 and is reported at 80 F. Supp. 2d 729.

JURISDICTION

The Sixth Circuit Court of Appeals entered its original opinion on March 21, 2000. Petitioner timely filed a Petition For Rehearing En Banc on March 31, 2000. On May 16, 2000 the Sixth Circuit Court of Appeals issued its Decision and Order Denying Petitioner's Petition For Rehearing En Banc (App. 1). This Court has jurisdiction pursuant to 28 USC §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. The supervisory powers inherent in the Supreme Court. Constitution, Article III, Section 1.

B. Implementation of the Collateral Order Doctrine of 28 USC §1291.

STATEMENT OF THE CASE

On June 26, 1998, Plaintiffs filed their Complaint in this action. The Complaint was amended on July 27, 1998. Plaintiffs bring their first and second claim under Title IX of the Education Amendments of 1972, 20 USC §1681 et seq. Plaintiffs' third claim is based on 42 USC §1983. On September 1, 1999, Defendants filed renewed motions for summary judgment, arguing that Defendants are neither direct nor indirect recipients of federal funds to subject them to the strictures of Title IX. Subsequently, Plaintiffs conceded and the district court recognized that Defendants are neither direct nor indirect recipients of federal funds. Defendants further contended that they are not "state actors" and that they have not otherwise engaged in state action to subject them to liability under 42 USC §1983.

Despite the Supreme Court's recent holding in *Davis v. Monroe County Board of Education*, 526 U.S. 629, 119 S.Ct. 1661, 143 L.Ed2d 831 (1999) that the federal government's enforcement power under 20 USC §1682 may only be enforced against the funding recipient and the

Sixth Circuit Court of Appeals' holding in *Soper v. Hoben*, 195 F. 3d 845 (6th Cir. 1999) that "it was not until recently that a court with binding authority found that only recipients of federal funds may be liable for damages under Title IX" (referring to *Davis, supra*), the District Court denied Defendants' motions and held as the **law of the case** that Title IX reached the non-recipient Defendants. Moreover the district court held as the **law of the case** that Defendants are "state actors" for purposes of 42 USC §1983 despite the Sixth Circuit Court of Appeals' clear and unequivocal holding in *Brentwood Academy v. Tennessee Secondary School Athletic Assn.*, 180 F. 3d 758 (6th Cir. 1999) ("*Brentwood I*") reh. den. (en banc) 190 F.3d 705 (6th Cir. 1999) Cert. Granted 120 S. Ct. 156 (U.S. Feb. 22, 2000 No. 99-901. ("*Brentwood II*"); Judge Enslen refused to follow *Brentwood I* and *II* because he asserts that the Sixth Circuit Court of Appeals decided *Brentwood* erroneously, although he also concluded that there were virtually no differences between the Tennessee Secondary School Athletic Association (TSSAA) and the Michigan High School Athletic Association (MHSAA).

REASONS FOR GRANTING THE PETITION

1. The decision of the District Court and the Sixth Circuit Court of Appeals have so far departed from the accepted course of judicial proceedings as to call for an exercise of this court's supervisory powers.

2. Maintaining uniformity of constitutional doctrine and the importance of uniform predictable administration of Federal Rules of Civil Procedure are a core basis for the exercise of this court's certiorari jurisdiction.

The circumstances of this petition satisfy that fundamental criteria.

Rule 10(a) of the Rules of the Supreme Court of the United States provide for certiorari jurisdiction when:

1. (The United States Court of Appeals) has decided important federal question in a way that conflicts with the decision by a state court of last resort or

2. " . . . has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such departure by a lower court, as to call for an exercise of this court's supervisory power."

The District Court held as a matter of law that although Petitioner is not a direct or indirect recipient of federal funds, it is subject to suit under 20 USC §1681 et seq. (Title IX) (Appendix 3, Opinion of Circuit Court, Page 16) because it "controlled athletic programs of recipients."

The District Court held as a matter of law that the Petitioner is a "state actor" because it "controls the athletic programs" of state institutions. Opinion of the Circuit Court Appendix 3, p. 22-24.

The error asserted in this petition is an error of the **law of the case** premised upon a disregard of this Court's and the Sixth Circuit Court of Appeals' binding precedent as illustrated below and the sanctioning of such conduct by the Sixth Circuit Court of Appeals.

I.

The decision of the District Court and the sanctioning of it by the Sixth Circuit Court of Appeals' refusal to take jurisdiction, conflicts with the Michigan Supreme Court's decision on the issue of who controls the athletic programs of the member institutions of the MHSAA.

The decision of the District Court and the sanctioning of it by the Sixth Circuit Court of Appeals' refusal to take jurisdiction, conflicts with the Michigan Supreme Court's decision on the issue of who controls the athletic programs of the member institutions of the MHSAA.

Kirby v. The MHSAA, 459 Mich 23 (1998) 585 NW 2d 290 held:

> "[The MHSAA] is a creature of its members, with no independent authority over schools or students. The schools can and should exercise appropriate oversight of the MHSAA." [FN 17]

Simply stated, the Michigan Supreme Court has held that the Petitioner has no authority or control over its membership except as it is in the nature of a contractual arbitration relationship during the administration of the post season tournaments the association sponsors or conducts. The district court held to the contrary and created an erroneous jurisdictional **law of the case** and the Sixth

Circuit Court of Appeals refused to act. Neither the United States Supreme Court nor any other federal tribunal has any authority to place construction on a state statue different from this one rendered by the state's highest court whether the state rule is procedural or substantive. *Johnson v. Fenkell*, 520 US 911, 117 S. Ct. 1800, 138 L.Ed. 2d 108 (1997).

II.

The decision of the District Court and the sanctioning of that decision by the non-action of the Sixth Circuit Court of Appeals let stand a law of the case that has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's supervisory powers.

The decision of the District Court and the sanctioning of that decision by the non-action of the Sixth Circuit Court of Appeals let stand a **law of the case** that has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's supervisory powers for the following reasons:

- **The District Court misconstrues *Cannon v. University of Chicago*, 441 U.S. 677, 99 S. Ct. 946, 60 L.Ed.2d 560 (1979) IN FINDING THAT Congress did *not* intend to ban discriminatory conduct engaged in *solely* by *recipients* and in**

extending the reach of Title IX to entities which do not receive federal financial assistance. *Cannon* only addressed the issue of who were permissible plaintiffs not who were permissible defendants.

- **The District Court refuses to follow the Supreme Court's holding in *U.S. Department of Transportation v. Paralyzed Veterans of America,* 477 U.S. 597, 106 S. Ct. 2705, 91 L.Ed. 2d 494 (1986) that only "recipients" of federal funds fall within the reach of §504 of the Rehabilitation Act of 1973, 29 USC §794, which is consistent with the federal regulatory definition of "recipient," 34 C.F.R. 106 (1997), for purposes of Title IX.**

- **The District Court refuses to follow *National Collegiate Athletic Assn. v. Smith,* 525 U.S. 459, 119 S. Ct. 924, 142 L.Ed. 2d 929 (1999) which holds that only recipients of federal funds fall within the reach of Title IX.**

- **The District Court refuses to follow *Davis v. Monroe County Bd. Of Education,* 526 U.S. 629, 119 S. Ct. 1661, 134 L.Ed. 2d 839 (1999) which holds that the federal government's enforcement power under 20 USC §1682 may only be enforced against funding recipients.**

- **The District Court refuses to follow the Sixth Circuit Court of Appeals' recent holding in *Soper v. Hoben*, 195 F. 3d 845 (6th Cir. 1999) that only recipients of federal funds may be liable under Title IX.**

- **The District Court refuses to follow the Sixth Circuit Court of Appeals' recent holding in *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 180 F. 3d 758, reh. den. 190 F. 3d 705 (6th Cir. 1999) Cert granted 120 S. Ct. 156 (U.S. Feb. 22, 2000) No. 99-901 which meticulously sets forth the criteria for determining whether non-recipient state high school associations are "state actors."**

The refusal of the District Court to follow binding president above constitutes a usurpation of judicial authority requiring mandamus. The Sixth Circuit Court of Appeals' sanction of such a departure from binding precedent is error which must invoke this court's supervisory authority.

III.

This is a case of national importance because of its impact on the rule of binding precedent and the implementation of 28 USC 1291 jurisdiction of the Court of Appeals.

A. The Opinion and Order constitute a Final Decision of the District Court and make the "law of the case."

Under 28 USC §1291, federal courts of appeal have "jurisdiction of appeals from all final decisions of district courts." The order is in fact a collateral order and should be reviewable under 28 USC §1291. The Collateral Order Doctrine is best understood not as an exception to the "final decision" rule laid down by Congress in §1291, but as a "practical construction" of it. *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 114 S. Ct. 1992, 1995, 128 L. Ed. 2d 842 (1994), quoting *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S. Ct. 1221, 1226, 93 L. Ed. 2d 1528 (1949).

In order to satisfy the criteria of the collateral order principle, "the order that the appellant seeks to appeal must '(1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment.'" *Wedding v. University of Toledo,* 89 F. 3d 316, 318 (6th Cir. 1996), quoting *Johnson v. Jones,* 515 U.S. 304, 115 S. Ct. 2151, 2155, 132 L. Ed. 2d 238 (1995). The third requirement can be satisfied by showing that the appellant will suffer irreparable harm if denied interlocutory review. *Firestone Tire & Rubber Co. v. Risjord,* 449 U.S. 368, 376, 101 S. Ct. 669, 66 L. Ed 2d 571 (1981) ("[I]t is true that the finality requirement should

'be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered'").

1. Conclusive determinations.

First, the District Court conclusively determined that, despite MHSAA's non-recipient status, Defendants are within the reach of Title IX because MHSAA controls the athletic programs of member schools which are presumably federal fund recipients. "Control" is the disputed fact conclusively found against the MHSAA by the above language. Despite the district court's subsequent conclusion that a genuine issue of material fact remains as to the "extent of control," any determination as to the extent or degree of control does not change the fact that the issue of control per se has already been conclusively determined.

Second, the district court conclusively determined that Defendants are "state actors" under 42 USC §1983 (this represents a disputed legal question) for the reason that Judge Enslen thinks that the Sixth Circuit Court of Appeals wrongly decided *Brentwood Academy, supra.*

2. Resolution of important issues completely separate from the merits of the action.

The merits of this case pertain to discrimination against female athletes in high schools. The issues raised in this proceeding at this time do not address the merits of

Plaintiffs' claims. These issues are completely separate and relate to the status of Defendants as either recipients under Title IX or "state actors" under 42 USC §1983.

3. Effectively unreviewable or irreparable harm.

The Supreme Court and Sixth Circuit Court of Appeals' prior discussions regarding state sovereign immunity and the collateral order doctrine are instructive. As acknowledged by the Sixth Circuit Court of Appeals, Supreme Court precedent has indicated that "[o]rders denying state sovereign immunity are 'effectively unreviewable' as part of a final decision." *Sault Ste. Marie Tribe of Chippewa Indians, et al. v. State of Michigan*, 5 F. 3d 147, 149 (6th Cir. 1993), citing *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 113 S. Ct. 684, 687-689, 121 L. Ed. 2d 605 (1993). As clarified by the Supreme Court in *Swint v. Chambers of County Commission, et al.*, 514 U.S. 35, 42, 115 S. Ct. 1203, 131 L. Ed. 2d 60 (1995), quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985), "qualified immunity is 'an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.'" Or as stated by the Tenth Circuit and quoted with approval by the Sixth Circuit Court of Appeals, "[t]he rationale for allowing an interlocutory appeal of an order denying immunity is that the defendant's right to be free from standing trial cannot be effectively vindicated on

appeal after trial." *Sault Ste. Marie, supra,* at 150, quoting *Clemens v. Kansas,* 951 F. 2d 287 (10th Cir. 1991) (internal brackets omitted).

Irreparable harm is also present in the case at bar. All of the harm that the district court's order can cause will occur before the case reaches final judgment on the merits because the decision from Appellate Courts would be too late to help Defendants, for they will have already completed the entire trial procedure:

> "All of the harm that the district court's verdict can cause will occur before the case reaches final judgment on the merits. Were we to determine, after final judgment on the merits of this case, that Article 19.10 is legal, our decision would come to late to aid the university, for it will have already completed its grievance procedure" Id at 319.
> *Wedding, supra*, at 319.

B. A Collateral Order is interlocutory in form but final in nature and creates the "Law of the Case."

As a general proposition all would agree that a denial of a motion to dismiss standing alone is not an appealable collateral order but simply an interlocutory order. But the inquiry does not stop there. Inquiry must be made into the grounds of the motion to dismiss.

If the ground for the motion to dismiss is immunity, then the order emanating from such a motion to dismiss is

reviewable under 28 USC §1291, even though it is interlocutory in form. *Sault Ste. Marie Tribe of Chippewa Indians, supra, Mitchell v. Forsyth,* 472 US 511, 526; 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985). This is so because such an order sets the **law of the case**.

If the grounds of a motion to dismiss are the existence of an arbitration agreement, then the order emanating from such a motion to dismiss is reviewable under 28 USC §1291 even though it is interlocutory in form. *Wedding v. University of Toledo,* 89 F. 3d 316, 318 (6th Cir. 1996) quoting *Johnson v. Jones,* 515 US 304, 115 S. Ct. 2151, 2155, 132 L. Ed 2d 238 (1995). This is so because such an order sets the **law of the case**.

The concept of immunity asks whether a person or entity is exempt from the operation of certain laws before addressing the merits of a case. A conclusive decision on that issue is interlocutory in form but final in effect, sets the **law of the case** and is reviewable under 28 USC §1291.

The concept of arbitration agreement asks whether a person or entity must use a certain forum for dispute resolution before addressing the merits of a case. A conclusive decision on that issue is interlocutory in form but final in effect, sets the **law of the case** and is reviewable under 28 USC §1291.

The concept raised by the MHSAA in its motion to dismiss asks whether the strictures of Title IX apply to an entity which indisputably does not receive federal funds directly or indirectly – an issue that has nothing to do with the merits of the underlying discrimination case. [*Davis,*

supra, and *Soper*, *supra*, held that same question to be a controlling question of law]. The concept of "not within the coverage of the act" asks whether a person or entity is exempt from the operation of certain law before addressing the merits of the case. A conclusive decision on that issue is interlocutory in form but final in effect, sets the **law of the case** and is reviewable under 28 USC §1291.

The type of question raised by the MHSAA and upon which relief is sought is identical to the question asked in immunity and arbitration cases and therefore must be construed as an appealable order pursuant to 28 USC §1291.

This Sixth Circuit Court of Appeals should have accepted review of this matter pursuant to 28 USC §1291 or granted mandamus under FRAP 21.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: July 14th, 2000

Table of Appendix Contents

6TH CIRCUIT FILINGS:

Order,
filed May 16, 2000 . . . . . 1-1 thru 1-2

Order,
filed March 21, 2000 . . . . . 2-1 thru 2-2

WESTERN DISTRICT OF MICHIGAN FILINGS:

Opinion,
filed January 21, 2000 . . . . . 3-1 thru 3-38

No. 00-1129

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, et al.,	)	
	)	**ORDER**
Petitioners.	)	

Before: NORRIS, MOORE, and COLE, Circuit Judges.

On March 21, 2000, the court denied the defendants' petition for a writ of mandamus. In a separate case, the court also denied the defendants' petition for leave to appeal under 28 U.S.C. § 1292(b). The court has received a single petition for rehearing, with a suggestion of rehearing en banc, requesting rehearing of both rulings. Although the defendants may seek rehearing and rehearing en bane of the denial of the mandamus petition, such relief is not available with respect to the denial of the petition for leave to appeal. However, the entire petition for rehearing en banc has been circulated not only to the original panel members, but also to all other active judges of the court, and no judge having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered on the initial submission and decision of the case.

Accordingly, the petition is **DENIED**

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green
Clerk

No. 00-1129

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, et al.,	)	
	)	**ORDER**
Petitioners.	)	
	)	

Before: NORRIS, MOORE, and COLE, Circuit Judges.

The defendants petition for a writ of mandamus directing the district court to grant their motion to dismiss the plaintiffs' claims under Title IX of the Education Amendments of 1972 and under the Equal Protection Clause of the Fourteenth Amendment pursuant to 42 U.S.C. § 1983. Alternatively, they request that the court construe the petition for a writ of mandamus as a notice of appeal, arguing that the district court's denial of their motion to dismiss is an appealable collateral order.

"The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations where the petitioner can show a clear and indisputable right to the relief sought." In re American President Lines, Ltd., 929 F.2d 226, 227 (6th Cir. 1991) (order) (citations omitted). The party seeking a writ of mandamus must have no other means of

obtaining the relief he desires; thus, mandamus cannot be used as a substitute for an appeal. See Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 8 n.6 (1983); Kerr v. United States District Court, 426 U.S. 394, 402 (1976). The defendants have not demonstrated that is case warrants the extraordinary relief of granting a writ of mandamus. In addition, we must decline the defendants' request to construe the petition as a notice of appeal because the denial of the motion to dismiss is not an appealable, collateral order.

The petition for a writ of mandamus and the alternative request to construe the petition as a notice of appeal are **DENIED**.

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green
Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

COMMUNITIES FOR EQUITY,
et al.,

Case No. 1:98-CV-479

Plaintiffs,

HON. RICHARD ALAN ENSLEN

v.

MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION,
et al.,

OPINION

Defendants.

_____/

Introduction

On June 26, 1998, Plaintiffs, consisting of the parents of two female student-athletes and an organization named Communities for Equity ("CFE"), filed a class action lawsuit alleging that the Michigan High School Athletic Association ("MHSAA") discriminated against female athletes. Plaintiffs allege that the discrimination took a variety of forms including: (1) providing more participation

opportunities to boys than girls; (2) requiring girls to play in "non-traditional" seasons; (3) operating shorter seasons for girls than boys; (4) scheduling female athletes to compete on less desirable dates than their male counterparts;(5) providing inferior athletic facilities for girls athletic tournaments in comparison to boys athletic tournaments; (6) requiring girls to play in some sports under rules that differ from the rules of the National Collegiate Athletic Association ("NCAA"); and (7) allocating more resources to support and promote boys athletic programs.[1]

At this point in the litigation, Plaintiffs assert claims against the MHSAA and the individual members of the MHSAA Representative Council in their official capacity. Claims One and Two arise under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 et seq., ("Title IX"). Claim Three arises under the Equal Protection Clause of the Fourteenth Amendment pursuant to 42 U.S.C. § 1983. Claims Four and Five arise under Michigan's Elliott-Larsen Civil Rights Act, Mich. Comp. Laws §§ 37.3101 et. seq. Plaintiffs seek declaratory, injunctive and monetary relief.

There are three motions currently before the Court. The first motion is Defendants' Renewed Motion for

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[1]Plaintiffs filed an Amended Complaint on July 27, 1998.

Summary Judgment for Lack of Standing. The second is the Individual Defendants' Renewed Motion for Summary Judgment. The third is Defendant MHSAA's Supplemental Motion for Summary Judgment Pursuant to FRCP 56(c) as to the First and Second Claim of Plaintiffs and Motion Pursuant to FRCP 12(b)(6) as to Plaintiffs' Third Claim of Relief.

These motions raise four distinct issues. First, are Defendants properly subject to Title IX's requirements if they do not receive federal financial assistance? Second, are Defendants "state actors?" Third, do Plaintiffs have standing to sue? Fourth, even if Defendant MHSAA is subject to Title IX, may the Individual Defendants be sued in their official capacities?

Discussion

Summary judgment requires that the Court determine whether the Plaintiffs have presented enough evidence so that a jury could reasonably find for them. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c);

Lapointe v. UAW, Local 600, 8 F.3d 376, 378 (6th Cir. 1993). Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of the judge. *Anderson*, 477 U.S. at 255. In addition, when considering a summary judgment motion, the evidence of the non-movant is to be believed and all justifiable inferences are to be drawn in his favor. *Adickes v. Kress*, 398 U.S. 144, 158-159 (1966).

I. TITLE IX

Section 901(a) of Title IX of the Education Amendments of 1972 provides that "no person in the United States shall on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). A "program or activity" includes "all the operations of... a college, university, or other post-secondary institution, or a public system of higher education... any part of which is extended Federal financial assistance." 20 U.S.C. § 1687(2)(A).

In most Title IX cases, the plaintiff attempts to demonstrate that the defendant is either a direct or indirect recipient of federal funds. *See generally Smith v. NCAA*, 119 S.Ct. 924 (1999); *Dept. of Transp. v. Paralyzed*

Veterans, 477 U.S. 597 (1986); *Grove City College v. Bell*, 465 U.S. 555 (1984). In this case, however, there is no evidence that the MHSAA is either a direct or indirect recipient of federal funds. First, the MHSAA does not receive any direct assistance from the federal government. Second, the MHSAA receives the bulk of its funding from gate receipts generated at MHSAA-sponsored tournaments. Based upon this evidence, the MHSAA is neither a direct nor indirect recipient of federal funds. *See generally Smith*, 119 S.Ct. at 929-930 (holding that NCAA was not an indirect recipient of federal funds even though it received dues from schools that received federal funds); *Horner v. Kentucky High School Athletic Ass'n*, 43 F.3d 265 (6th Cir. 1994) (holding that Kentucky High School Athletic Association was an indirect recipient of federal funds because it was created by state law, its functions were determined by the Kentucky Board of Education, and it received dues from member schools who received federal funds); *Yellow Springs, etc. v. Ohio High Sch. Ath. Ass'n*, 647 F.2d 651 (6th Cir. 1981) (holding that Ohio High School Athletic Association was not a recipient of federal funds because it did not receive direct federal assistance, and it did not receive money from local schools who were recipients of federal assistance).

Although this might ordinarily end the Court's inquiry and justify a decision to grant Defendants' Motion for Summary Judgment, both Plaintiffs and the United

States as amicus curiae argue that even though the MHSAA is not a federal aid recipient, it is nonetheless subject to Title IX. The premise of this argument is that because local Michigan school districts have "ceded control" over interscholastic athletics to the MHSAA, and because interscholastic athletic programs receive federal financial assistance, MHSAA has control over a federally funded activity and should be subject to Title IX. This precise issue was left unresolved by the recent Supreme Court decision in *Smith* which explicitly declined to consider whether, "when a recipient cedes controlling authority over a federally funded program to another entity, the controlling entity is covered by Title IX regardless [of] whether it is itself a recipient." *Id.* at 930.

Given that the Supreme Court has left this issue unresolved, the Court believes that it must analyze two questions to resolve Defendants' motions relating to Title IX. First, as a matter of law, is the exercise of controlling authority over a federally funded program sufficient to trigger Title IX? Second, is there a genuine issue of material fact as to whether local Michigan school districts have ceded controlling authority over interscholastic athletics to the MHSAA, such that the MHSAA effectively controls those athletic programs? Each of these issues will be addressed in turn.

A. Legal Question

Turning first to the legal question, few courts have considered whether exercising "controlling authority" over a federally funded activity is sufficient to subject an entity to Title IX. *See generally Cureton v. NCAA*, 37 F. Supp. 687 (E.D.Pa. 1999) (holding, in part, that the NCAA was subject to Title IX because it exercised controlling authority over athletic programs receiving federal financial assistance) *rev'd Cureton v. NCAA*, 1999 WL 1241077 (3rd. Cir. 1999) (holding that the NCAA did not exercise "controlling authority" over school athletic programs). *See also Kemether v. Penn. Interscholastic Athletic Assoc.*, 1999 WL 1012948 (E.D.Pa. Nov. 8, 1999) (holding that Title IX subjects state athletic association to suit under the theory that association controls athletic programs receiving federal aid). For the reasons stated below, the Court does not find the reasoning in these non-controlling cases to be persuasive.

This Court's analysis begins with *Cannon v. University of Chicago*, 441 U.S. 677 (1979). In *Cannon*, the Supreme Court was asked to determine whether Title IX implied a private right of action. In deciding this question, the Supreme Court engaged in an analysis of the history, subject matter, and purpose of Title IX. That analysis led the Supreme Court to two related conclusions. First, the Supreme Court concluded that the wording and purpose of

Title IX indicated that it was enacted for the benefit of a particular class of people - those discriminated against on the basis of sex. *Id.* at 689-91. In reaching this conclusion, the Supreme Court explicitly rejected the proposition that Title IX was enacted "as a ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disbursement of public funds to educational institutions engaged in discriminatory practices." *Id.* at 691-92. Second, the Supreme Court recognized that Title IX sought to accomplish two related, but nevertheless somewhat different objectives ... Congress wanted to avoid the use of federal resources to support discriminatory practices; [and] it wanted to provide individual citizens effective protection against those [discriminatory] practices." *Id.* at 704. In reaching this conclusion, the Supreme Court explained that a private right of action, in contrast to a suit brought by the federal government, was "fully consistent with - and in some cases even necessary to - the orderly enforcement of the statute." *Id.* at 705-06. Based upon this analysis, the Supreme Court concluded that Title IX implied a private cause of action.

Based in large part upon the Supreme Court's understanding of Title IX in *Cannon,* this Court is convinced that any entity which has controlling authority over a "program or activity receiving Federal financial assistance" is subject to Title IX's anti-discrimination rule, even if that entity does not itself receive the federal funds

which finance the program or activity. In reaching this conclusion, the Court rejects Defendants' argument that only recipients of federal funds are subject to Title IX because this interpretation is at odds with the plain meaning and purpose of the statute.

To begin with, Section 902 of Title IX does not, on its face, confine the list of potential defendants to "recipients" of federal funds. Instead, it simply prohibits discrimination "under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). While the most likely entity subject to this prohibition would be a school district that is a recipient of federal aid, there is nothing in the statute which limits the class of potential defendants to such recipients. Instead, the statute prohibits discrimination, presumably by anyone, "under any education program or activity receiving Federal financial assistance." *Id.*

This interpretation of the statute is supported by the Supreme Court's analysis in *Cannon.* In that case, the Supreme Court made it clear that Title IX did not simply ban discrimination by recipients of federal funds; it provides a remedy for individuals who have been discriminated against on the basis of sex in the operation of programs receiving federal aid. *See Cannon,* 441 U.S. @ 691-92. Defendants ask the Court to interpret Title IX as only applying to recipients of federal funds, but this is precisely

the interpretation of Title IX that the Supreme Court seemed to reject in *Cannon*. *Id.*

Not only is Defendants' suggested interpretation of Title IX unsupported by the plain meaning of Title IX and the *Cannon* decision, it is empty formalism. If Defendants' interpretation prevailed, Title IX would prohibit "recipients" of federal funds from discriminating on the basis of sex, but would allow entities that controlled those funds to discriminate so long as those entities were not themselves "recipients." Such a scheme would not only encourage "recipients" of federal funds to transfer control over those funds to others (because both parties could thereby avoid Title IX liability), it would allow federal funds to promote gender discrimination so long as the recipients of those funds empowered someone else to promulgate the discriminatory policies. In this Court's view, such a formalistic interpretation is not warranted by the meaning or purpose of the statute.

Although the Court concludes that exercising "controlling authority" is sufficient to subject an entity to liability under Title IX, it must acknowledge that prior Supreme Court and Sixth Circuit precedent has implied that Title IX is only triggered if the defendant is a "recipient" of federal money. *See Grove City College v. Bell,* 465 U.S. 555 (1984) (examining whether Grove City College was a recipient of federal financial assistance in order to

determine whether it was subject to Title IX); *Dept. of Transp. v. Paralyzed Veterans,* 477 U.S. 597 (1986) (stating that Congress limited the scope of § 504 of the Rehabilitation Act - a statute with similar wording and history to Title IX - to cover only entities that receive federal financial assistance); *Horner v. Kentucky High Sch. Ath. Assn,* 43 F.3d 265 (6th Cir. 1994) (examining extent to which Kentucky High School Athletic Association ("KHSAA") could be considered a recipient of federal financial assistance in order to determine whether it was subject to Title IX).[2]

While the Court is mindful of these three decisions, it concludes that they are not conclusive on the issue currently before the Court. The Court reaches this conclusion for three reasons.

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[2]As noted earlier, Section 902 of Title IX (20 U.S.C. § 1681(a)) does not use the term "recipient," although it does reference programs that "receive" federal funds. The Court suggests that one reason that courts have focused on "recipients" of federal funds is because entities that receive federal financial assistance will almost always be in control of those funds. Therefore, in the normal case, there is no need to inquire into who "controls" the funds. It is only in the rarest of cases, such as this one, where the entity that controls the federal funds and the entity that receives the federal funds are different, that the issue of control becomes important.

First, none of these cases explicitly considered the "controlling authority" rationale. Therefore, while these cases focused on whether certain defendants were appropriately considered recipients of federal funds, these cases did not explicitly hold that only recipients could be Title IX defendants. *See Smith,* 119 S.Ct. at 929-930 (implying that the "controlling authority" theory of Title IX liability has not been addressed by the Supreme Court).

Second, the holdings in all three of these cases are logically consistent with the "controlling authority" theory of liability. *See Grove City,* 465 U.S. at 563-570 (finding that Grove City College was a proper defendant under Title IX where it had obvious control over its own financial aid program which was funded, in part, by federal grants); *Paralyzed Veterans,* 477 U.S. at 604-611 (finding that air carriers were not subject to Title IX where they had no control over program which developed airports and received federal aid); *Horner,* 43 F.3d at 272 (finding that KHSAA was properly sued under Title IX where it had control over interscholastic athletic programs that were receiving federal financial assistance).

Third, the case which goes the furthest in implying that only recipients of federal funds may be subject to Title IX, *Paralyzed Veterans,* is inconsistent with the Supreme Court's explicit analysis in *Cannon.* In *Paralyzed Veterans,* the Supreme Court held that § 504 of the Rehabilitation Act

only applied to recipients of federal funds, noted that § 504 and Title IX were similar statutes, and thereby implied that Title IX's requirements were similarly limited to recipients of federal aid. *See Paralyzed Veterans,* 477 U.S. at 605-606. This implication, however, is at odds with the Supreme Court's analysis in *Cannon* that Title IX does more than simply prevent recipients of federal funds from discriminating on the basis of sex. *See Cannon* 441 U.S. at 691-92, 704-06. Therefore, whatever implication arises out of *Paralyzed Veterans* is trumped by the Supreme Court's explicit analysis in *Cannon.*

Therefore, because the plain meaning of Section 902 of Title IX does not limit the class of defendants to recipients of federal funds, because the *Cannon* decision makes it clear that Title IX was designed to prevent sex discrimination in programs that are financed by federal money (as opposed to merely stopping recipients of federal resources from discriminating), because the precedent of the Supreme Court and the Sixth Circuit is consistent with the "controlling authority" theory of liability, and because holding otherwise would be nothing more than empty formalism, the Court concludes that any entity that exercises controlling authority over a federally funded program is subject to Title IX, regardless of whether that entity is itself a recipient of federal aid.

B. Factual Question

Having concluded that "controlling authority" is a valid basis for Title IX liability, the Court turns to whether Plaintiffs have offered sufficient evidence that the MHSAA possesses the necessary authority to create a genuine issue of material fact. In order to sustain this burden, Plaintiffs point to a variety of factors. First, they point out that local school districts receive federal funds and therefore those districts' athletic programs are "programs or activities receiving Federal financial assistance . . .. " *See* 20 U.S.C. § 1687(2)(A). Second, they note that the MHSAA's stated purpose is "to create, establish and provide for, supervise and conduct interscholastic programs throughout the state." Third, they argue that MHSAA promulgates rules and decisions that influence virtually every aspect of interscholastic athletics. Specifically, they point to: MHSAA's eligibility requirements, MHSAA's rules governing contests, MHSAA's rules relating to coaches, MHSAA's rules relating to the training of officials, MHSAA's decisions about the seasons in which certain sports will be played, MHSAA's rules relating to the number of practices that are allowed, and MHSAA's control over postseason competitions. In light of the fact that virtually every high school in Michigan is a member of MHSAA, each school agrees to be bound by the rules of MHSAA, and the MHSAA can impose sanctions on schools that violate its rules, the Plaintiffs argue that schools have

ceded controlling authority over interscholastic athletics to the MHSAA.

In response, Defendants argue that MHSAA receives no money from its member schools either directly or indirectly. Furthermore, they point out that Michigan law vests a non-delegable duty to regulate interscholastic athletics in local school boards. More specifically, they counter Plaintiffs' assertion that local schools have ceded control over interscholastic athletics with the following facts: individual schools are solely responsible for decisions about what teams to sponsor, MHSAA rules must be formally adopted by local school districts, these districts are primarily responsible for enforcement, membership in MHSAA is voluntary, and local school districts often make and enforce rules that are more stringent than MHSAA rules. From Defendants' perspective, the relationship between school districts and the MHSAA is analogous to the relationship between adverse parties and an arbitrator. Defendants argue that the MHSAA simply provides member schools with a set of rules, which the member schools suggest and must formally adopt, so that a uniform set of rules can be obtained.

Essentially, Plaintiffs and Defendants disagree about what it means to "cede controlling authority." Plaintiffs assert that because the MHSAA makes the rules, it has controlling authority over interscholastic athletics - even

though the local school districts must formally ratify those rules. Defendants argue that MHSAA cannot have controlling authority over interscholastic athletics because a school district is only bound by MHSAA rules if that school district formally adopts those rules.

To resolve this disagreement, the Court begins with a review of the MHSAA and its historic role in interscholastic athletics. In 1924, the MHSAA was founded to "exercise control over the interscholastic athletic activities of all schools of the state through agreement with the Superintendent of Public Instruction." 1978-90 MHSAA Handbook, Foreword. Prior to 1965, the Superintendent of Public Instruction was given supervision and control over interscholastic athletics by statute. *See* School Code of 1955, 1955 PA 269 § 784. Then, in 1965, this authority was transferred to the State Board of Education via statute. Mich. Comp. Laws § 388.1014. From 1924 through 1974 the MHSAA appears to have been part of the state government, assisting either the Superintendent of Public Instruction or the State Board of Education in regulating interscholastic athletics.

In 1972, the Michigan legislature transferred authority over interscholastic athletics from the State Board of Education to the local school boards. In addition to transferring authority over interscholastic athletics in this manner, the Michigan legislature provided that:

> The [MHSAA] is the official association of the state for the purpose of organizing and conducting athletic events, contests, and tournaments among schools and shall be responsible for the adoption and enforcement of rules relative to eligibility of athletes in schools for participation in interschool athletic events, contests and tournaments.

Id. at § 380.1292(2). In addition to this "official designation," a representative of the State Board of Education was required to be a member of the MHSAA governing body. *Id.* at § 380.1292(1). In 1972, the MHSAA incorporated as a private association.

In 1995, the Michigan legislature again amended the statute. This time it removed MHSAA's official designation but explicitly provided that local school districts could "join organizations as part of performing the function of the school district." *Id.* at § 380.1la(4). While the MHSAA's public or private status may have changed throughout the years, its basic function appears to have remained the same since its inception in 1924 - create rules and policies for the regulation of interscholastic athletics in the state of Michigan.

Against this historical backdrop, the Court's analysis of the extent to which the MHSAA currently exercises control over interscholastic athletics begins with a review of

the MHSAA Handbook For 1999-2000 School Year" (Handbook). The forward to the Handbook provides, "the Michigan High School Athletic Association, Inc. is a private, voluntary association of public, private and parochial secondary schools...[i]t is not necessary for any school to join the MHSAA in order to conduct a program of competitive athletics, and MHSAA member schools are not prohibited from engaging in competition against non-member schools...MHSAA is a self-supporting organization that does not rely on taxpayer dollars from any agency of the state or federal government. Schools do not pay membership dues, tournament entry fees, or service fees. When schools host MHSAA events they are reimbursed their itemized expenses and usually generate additional income from concession and program sales, parking fees, and a portion of gate receipts..." Forward, MHSAA Constitution. The MHSAA Constitution goes on to provide that, "all high schools, junior high/middle schools, or other schools of Michigan...may become members of this organization..." Art. II, MHSAA Constitution. These provisions confirm Defendants' assertion that MHSAA is a private organization and that membership is purely voluntary. As such, these provisions go a long way in assuring the Court that the MHSAA does not exercise controlling authority over interscholastic athletics because the local schools can presumably disregard MHSAA rules, or exercise their option not to join the MHSAA, whenever they choose.

However, as the Court reads the MHSAA Handbook more closely, its initial assessment of the benign relationship between the MHSAA and local school districts is called into question. In the same forward that promises individual school districts that their membership in MHSAA is purely voluntary, MHSAA writes, " **... schools adopt the Regulations and Interpretations of this Handbook as their own and agree to be primarily responsible for their enforcement.**" (emphasis in original). This warning is then reiterated by the MHSAA Constitution which provides,

> [f]or a school to become a member of this organization, its board of education/governing body must complete the annual Membership Resolution stating that the board of education/governing body has adopted the organization's rules as its own and agrees to primary enforcement of such rules as to its own schools. Failure to implement required effects of policies and procedures promulgated by the organization to govern eligibility, competition and tournaments shall require that members of the administration and board of education/governing body appear before the [MHSAA] to show cause why the school is not in violation of the terms of its Membership Resolution.

Art. II, MHSAA Constitution. These provisions run contrary to the permissive and voluntary tone of the

previously cited provisions and demand a closer examination of the relationship between the MHSAA and local school districts.

To uncover the precise nature of this relationship, it is necessary to examine the duties assigned to the Representative Council, the governing body of the MHSAA. The MHSAA Constitution provides:

> Article VI -- Duties of the Council
>
> Sec. 1. The Council shall have general control of interscholastic athletic policies.
>
> Sec. 2. It shall make rules of eligibility for players.
>
> Sec. 3. It shall make regulations for the conduct of interscholastic contests.
>
> Sec. 4. It shall be the annual responsibility of the Council to ascertain that the Council elective process has provided for representation of females and minorities. If, in the judgment of the Council, these results have not been achieved, said Council shall not appoint not to exceed four Representative Council members-at-large for two-year terms.

Sec. 5. It may discipline member schools and contest officials for violations of rules and regulations

Sec. 6. It shall provide for the hearing of appeals from decisions of the Executive Director

Sec. 7. It shall exercise all other functions necessary for carrying out the spirit and purpose of the Constitution. Art.

Art. VI, MHSAA Constitution. Not only is the Representative Council given broad authority to regulate interscholastic athletics, a separate Due Process Procedure provides a complex process which governs "the investigation into alleged or contested violations by a party of the Constitution, By-Laws, regulations, rules, or interpretations of the MHSAA." The Regulations provide lengthy eligibility requirements, limitations on the number of games that may be played, specifications of what type of officials may be used, rules for playing MHSAA sports, practice and scrimmage schedules, limitations on the number of games in which an athlete may participate in a given week, day, month, etc, maximum number of competitions allowable in a given year, a list of sanctions for a wide variety of violations, and a calendar of MHSAA sponsored state tournaments. These Regulations cover 51 pages of the Handbook.

A comprehensive review of the Handbook undercuts Defendants' assertion that MHSAA has no real control over interscholastic athletics. Defendants may be correct, as a technical matter, that the local schools must formally adopt MHSAA rules and enforce MHSAA policies, but this does not necessarily mean that MHSAA does not have control over those rules or policies. There is only one interscholastic athletic association in the state of Michigan and that is the MHSAA. In a very real sense, the MHSAA has a de facto monopoly over interscholastic sports. This is evidenced by the fact that there is not a single high school in the state of Michigan, that is eligible for MHSAA membership, that is not a member. While local school districts may have the power to disregard MHSAA rules or policies, and the legal authority to leave the Association altogether, these are not realistic options given the nature of interscholastic sports in Michigan. If a local school district were to disregard MHSAA rules, or leave the MHSAA, it would subject itself to MHSAA imposed sanctions (including possible expulsion), jeopardize its ability to compete in statewide tournaments, find it difficult to schedule opponents, and in general have problems providing interscholastic athletic programs to its students.

This explains why Defendants' reliance, on statements by the Michigan Attorney General and several state courts that interscholastic sports is a "non-delegable" duty of the local school districts, is misplaced. While the

regulation of interscholastic athletics under Michigan state law is "non-delegable," the local school districts have delegated it to the Defendants. Having delegated this duty, the local school districts have now lost the power to control interscholastic athletics independent from the MHSAA.

The evidence presented reveals a genuine issue of material fact regarding the extent to which the MHSAA exerts control over interscholastic athletics. Thus, summary judgment must be denied.[3]

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[3]The Court notes that the relief which the Plaintiffs seek cannot be obtained by suing the school districts directly. This is because the local school districts cannot unilaterally alter any policies of the MHSAA that are discriminatory. Assuming Plaintiffs allegations are true, the only way a local school districts could avoid whatever discrimination emanates from MHSAA policies would be to withdraw from the MHSAA. While this might end the discrimination, it would do so by depriving Plaintiffs of the ability to participate in interscholastic sports at all.

The Court believes that the potential inability to hold anyone accountable for alleged discrimination in a program receiving federal financial assistance is precisely why the ceding "controlling authority" is consistent with the purpose of Title IX. Without liability for those who control federal programs, such as interscholastic athletics, victims of discrimination are placed in an untenable dilemma clearly at odds with the spirit, purpose, and language of Title IX. On the one hand, these victims may seek a remedy from the

II. EQUAL PROTECTION AND 42 U.S.C. § 1983

Defendants also ask this Court to grant summary judgment in their favor with respect to Plaintiffs' 42 U.S.C. § 1983 claim. Defendants argue that the MHSAA is not a state actor and therefore cannot be liable under § 1983. Plaintiffs respond that the symbiotic relationship between the state of Michigan and the MHSAA is so pronounced that the MHSAA should be considered a state actor.

In the Sixth Circuit, "the principal inquiry in determining whether a private party is a "state actor" is whether the party's actions may be 'fairly attributable to the state.'" *Wolotsky v. Huhn,* 960 F.2d 1331,1335 (6th Cir. 1992) *citing Lugar v. Edmondson Oil Co.,* 457 U.S. 922,937 (1982). The Supreme Court has created three tests to assist courts in making this determination. First, the public function test. *See West v. Atkins,* 487 U.S. 42

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athletic association, but that association will respond that it only makes "suggestions" to the local school districts, and that the local school districts have the real power to adopt and enforce policies and rules. On the other hand, these victims might go to the local school districts to address their problems, but these districts will respond that they are powerless to change the policies of the MHSAA on their own, and that the MHSAA holds all the real power over interscholastic athletics.

(1988). Second, the state compulsion test. *Adickes. v. S.H. Kress & Co.,* 398 U.S. 144 (1970). Third, the symbiotic relationship or nexus test. *Burton v. Wilmington Parking Auth.,* 365 U.S. 715 (1961). The Supreme Court has suggested that these tests may be simply "different ways of characterizing the necessarily fact-bound inquiry that confronts the Court [when resolving state actor questions]." *Lugar,* 457 U.S. at 939.

The public function test asks whether "the private entity exercises powers which are traditionally exclusively reserved to the state, such as holding elections, or eminent domain." *Wolotosky,* 960 F.2d at 1335. Although the United States, as amicus, argues that interscholastic sports in Michigan is a public function, this position is contradicted by the Sixth Circuit's analysis in *Brentwood Academy v. Tennessee Secondary School Athletic Association,* 180 F.3d758,763 (6th Cir. 1999). In that case, the Sixth Circuit concluded, based upon the Supreme Court's decision in *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee,* 483 U.S. 522, 545 (1987), that interscholastic sports is not a power traditionally reserved to the state. *Id.* While this Court agrees with the United States that the State of Michigan has a long history of regulating interscholastic athletics (*see* I, B above), and that many of the cases and Michigan Attorney General opinions which Defendants cite indicate that interscholastic athletics is a "traditional government

function," the Sixth Circuit's analysis in *Brentwood* is controlling.

The state compulsion test examines the extent to which the party seeking to establish state action can prove that the state so coerced or encouraged a private entity to act in a given way that the entity's action must be regarded as the choice of the state. *Wolotsky,* 960 F.2d at 1335. The Court believes that the MHSAA is a state actor pursuant to this test. The most persuasive argument supporting this conclusion is made by Defendants, albeit in the context of Title IX, where they argue that interscholastic athletics is a "non-delegable" duty of local school districts. According to Defendants, because all power over interscholastic athletics is held by the local districts, the MHSAA only acts at the will and direction of those districts. This characterization of the MHSAA - local school district relationship, added to the fact that the MHSAA is governed by a Representative Council comprised of primarily state employees (16 of the Representative Council members are public school employees and the Superintendent of Instruction is an ex-officio member), combines to make a strong case that the MHSAA is a state actor pursuant to the state compulsion test.

While satisfaction of the state compulsion test is reason enough to conclude that the MHSAA is a state actor, the Court is even more convinced by application of the

symbiotic relationship test. As the Sixth Circuit explained, "under the symbiotic relationship or nexus test, the action of a private party constitutes state action when there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself." *Wolotsky,* 960 F.2d at 1335.

There is no denying that there is a unique and close relationship between the MHSAA and the State of Michigan. Among other factors which define this relationship, the MHSAA is made up of primarily public schools,[4] public school employees are elected to serve on the Representative Council which oversees the MHSAA, school employees who desire to serve on the Representative Council must have approval from their principal or school district superintendent, the Michigan Superintendent of Public Instruction is an ex-officio member of the Representative Council, the MHSAA exercises tremendous influence and control over the rules and policies that regulate interscholastic athletics, MHSAA rules and policies are binding on all schools unless they withdraw from the MHSAA, and local school districts are primarily responsible for enforcing MHSAA rules and policies. Based upon

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[4]In the 1998-1999 school year, the MHSAA was comprised of 617 public high schools and 114 private schools.

similar factual circumstances linking state athletic associations to the state, a variety of Circuit Courts have found that these associations are state actors. *See Griffin High School v. Illinois High School Athletic Ass'n,* 822 F.2d 671, 674 (7th Cir. 1987); *In Re: United Sates ex. rel Missouri State High School Activities Assn,* 682 F.2d 147, 151 (8th Cir. 1982); *Clark v. Arizona Interscholastic Ass'n,* 695 F.2d 1126, 1128 (9th Cir. 1982); *Moreland v. Western Pennsylvania Interscholastic Athletic League,* 572 F.2d 121, 125 (3rd Cir. 1978); *Louisiana High School Athletic Assn v. St. Augustine High School,* 396 F.2d 224, 227 (5th Cir. 1968); *Oklahoma High School Athletic Ass'n v. Bray,* 321 F.2d 269, 273 (10th Cir. 1963). If this were the only precedent on the issue, the Court would be hard-pressed to justify any conclusion other than that the MHSAA is a state actor.[5] However, before the Court reaches this conclusion,

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[5]Defendants' argument that it is not a state actor, because it receives no state funds, is similar to its Title IX argument in that both ask the Court to exalt form over substance. The Supreme Court has repeatedly found, however, that when determining whether a private entity is a "state actor," courts should engage in a factual and pragmatic inquiry as opposed to an overly formalistic mode of analysis. *See Lugar,* 457 U.S. at 939; *Terry v. Adams,* 345 U.S. 461 (1953) (rejecting formalistic application of the Fifteenth Amendment and holding that Jaybird Political Party was a state actor on the grounds that the Jaybird primary had the practical effect of determining who would win the general election and the party was created for the

there are two reported decisions which demand close attention.

In *Brentwood Academy v. Tennessee Secondary School Athletic Association,* 180 F.3d 758 (6th Cir. 1999), the Sixth Circuit was asked to decide whether the Tennessee Secondary Athletic Association ("TSSAA") was a state actor when it enforced a rule against a private school, Brentwood Academy, that prohibited the school from using undue influence in recruiting student-athletes. The Sixth Circuit began by analyzing the structure and function of TSSAA which is strikingly similar to the MHSAA in this case.[6] The Sixth Circuit noted that: (1) the TSSAA was a

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sole purpose of avoiding the Fifteenth Amendment and discriminating against blacks); *Smith v. Allright,* 321 U.S. 649, 661 (1944) (holding that Texas Democratic Party was subject to the Fourteenth Amendment as a state actor and rejecting as a "slight...change in form" defendants' argument that because the Democratic Party was a private entity it was not a state actor).

[6]There are only minor differences between the TSSAA and the MHSAA. First, whereas the TSSAA had nine members on the governing board, the MHSAA has 18. Second, whereas all members of the TSSAA Control Board were public school employees during the relevant time period, 16 of the 18 members of the MHSAA Representative Council were public school employees. Third and finally, whereas the TSSAA was "designated" by the Tennessee Board of Education to conduct interscholastic

voluntary organization, that authorized member schools to withdraw at any time; (2) the TSSAA was made up of public and private schools; (3) a Board of Control, made up of nine members elected from member schools, decided TSSAA policy; (4) at all relevant times the Board of Control was comprised of public high school administrators; (5) the TSSAA receives no state funding; (6) the TSSAA's revenue was generated from gate receipts at state tournaments and the TSSAA negotiated contracts with member schools for the use of their facilities to house these tournaments; and (7) while a Tennessee Board of Education rule at one time designated the TSSAA to conduct interscholastic athletics, this rule was repealed in 1995.

With these facts in mind, the court examined prior Sixth Circuit precedent and concluded that Brentwood Academy had failed to satisfy any of the three tests for determining when a private entity should be considered a state actor. In reaching this conclusion, the Sixth Circuit examined several of its prior decisions that had held that a state athletic association was a state actor. *See Yellow Springs v. Ohio High School Athletic Association,* 647 F.2d 651 (6th Cir. 1981); *Aldering v. Ohio High School Athletic*

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athletics until 1995, the MHSAA was statutory authorized to oversee interscholastic athletics until 1995 at which time Michigan state law was amended.

Association, 779 F.2d 315 (6th Cir. 1985). The Sixth Circuit concluded that these decisions were not controlling. *Brentwood Academy,* 180 F.3d at 764-766.

Additionally, the Sixth Circuit examined the extent to which a finding that TSSAA was not a state actor was consistent with Footnote 13 of the Supreme Court's decision in *NCAA v. Tarkanian,* 488 U.S. 179, 193 n.13 (1988). The Sixth Circuit explained that while *Tarkanian* Footnote 13 indicated that high school athletic associations might potentially be state actors in relation to public schools, the same footnote indicates that "even if an athletic association is a state actor when dealing with a public school, it 'was not acting under color of state law in its relationships with private universities.'" *Brentwood Academy,* 180 F.3d at 766 *citing Tarkanian* 488 U.S. at 193 n. 13. Therefore, the Sixth Circuit concluded that because Brentwood Academy was a private school, Footnote 13 did not require a finding that the TSSAA was a state actor. *Brentwood Academy,* 180 F.3d at 766.

This analysis misapplies the reasoning in *Tarkanian.* In *Tarkanian,* the Supreme Court was asked to decide whether the National Collegiate Athletic Association ("NCAA') was acting under color of state law when it conducted an investigation into athletic programs at the University of Nevada Las Vegas ("UNLV") and recommended to UNLV that it discipline its mens basketball

coach, Jerry Tarkanian. In a 5-4 decision, the Supreme Court concluded that the NCAA was not a state actor.

The central issue in the case was whether the NCAA's recommendations, and UNLV's adverse employment actions, were so coordinated that they should be considered "joint actions" such that the NCAA was a state actor. *Tarkanian,* 488 U.S. at 194-199. Before analyzing this "joint action" issue, however, the majority opinion briefly examined whether UNLV exercised such control over the NCAA that all NCAA policies and actions were transformed into state actions. *Id.* at 193. The majority observed that the NCAA was made up of colleges and universities from all across the country, and that UNLV had no more influence over the NCAA than other schools. *Id.* Therefore, because these colleges and universities outside of Nevada were not acting under color of Nevada state law, the NCAA's decisions and policies could not possibly be considered to be those of the state of Nevada. *Id.*

At this point, the majority inserted Footnote 13. *Id.* at 193 n. 13. The first sentence of the Footnote points out that the majority's analysis would be quite different in cases where an association's membership consisted entirely of schools from the same state, many of which were public institutions. *Id.* The majority then cited two circuit court decisions which found that state athletic associations were

state actors. *Id.* In the second sentence of the Footnote, the majority notes that the dissenters accept the proposition that the NCAA is not a state actor when it takes "joint action" with a private university, and that the majority of the NCAA's membership is private schools. *Id.* The inference to be drawn from this second sentence is that because the dissenters accept the idea that "joint action" between the NCAA and a private university would not transform NCAA action into state action, and because the NCAA is made up of primarily private universities, the NCAA cannot be considered a state actor based upon its membership. The majority is using the dissents "joint action" analysis to reinforce its own conclusion that the NCAA cannot possibly be a state actor because of its membership.

The *Tarkanian* case required the Supreme Court to examine two independent state actor questions. First, the Supreme Court was required to briefly analyze in what instances an athletic association might be considered a state actor because its members controlled the association and those members were state actors. ("The membership question"). Second, the Supreme Court examined in what instances an athletic association should be considered a state actor when it engages in joint activity with the state. ("The joint action question"). With these independent inquiries in mind, Footnote 13 appears to stand for three propositions. First, an athletic association made up of schools from across the country, the majority of which are private schools, is

not a state actor because no one state controls the policy of the association. Second, if an association were made up of schools from the same state, and the majority of those schools were public, the association might well be a state actor. Third, while "joint action" between a public school and a private association might render the private association a state actor, joint action between a private school and a private association would not.

The Sixth Circuit's opinion in *Brentwood Academy* misstates the Supreme Court's reasoning in *Tarkanian.* The Sixth Circuit explained that the TSSAA was not a state actor, in part, because "all nine justices agree that even if an athletic association is a state actor when dealing with a public school, it 'was not acting under color of state law in its relationship with private universities.'" *Brentwood Academy,* 180 F.3d at 766 *citing Tarkanian* 488 U.S. at 193 n. 13. The problem with this analysis, however, is that this quoted line from Footnote 13 applies to the joint action question, not the membership question at issue in *Brentwood Academy.* In *Brentwood Academy,* the issue was not whether "joint action" between the TSSAA and Brentwood Academy transformed the TSSAA into a state actor, it was whether the TSSAA was a state actor because its members were primarily public schools, it was historically recognized by the state of Tennessee, and its Board was dominated by public school employees. As a result, there appears to be a serious disconnect between

Tarkanian and the Sixth Circuit's reasoning in *Brentwood Academy*.

In the end, the Court concludes that the MHSAA is a state actor. The Court reaches this conclusion for four primary reasons. First, the actions of the MHSAA may be "fairly attributed to the state" as evidenced by the fact that under the state compulsion test or the symbiotic relationship test, the MHSAA is a state actor. Second, the vast majority of circuit courts to consider this issue have concluded that state athletic associations such as the MHSAA are state actors. Third, the *Brentwood Academy* decision is not controlling in this case because (a) it cannot be reconciled with Footnote 13 in *Tarkanian,* and (b) by its own terms its analysis is limited to a unique factual situation - a private school alleging that a state athletic association is a state actor when it regulates that private school - not present here. Fourth, Footnote 13 of the *Tarkanian* decision indicates that the Supreme Court believes that state athletic associations, such as the MHSAA, are state actors. Therefore, the Equal Protection Clause claim survives Defendants' Motion for Summary Judgment and Motion to Dismiss.

III. Standing

Plaintiffs bear the burden of demonstrating standing. "To establish Article III standing to sue in federal court, an individual plaintiff must show that (1) he or she has suffered an injury in fact; (2) there is a causal connection between the injury and the conduct complained of; and (3) the injury will likely be redressed by a favorable decision." *American Federation of Government Employees v. Clinton,* 180 F.3d 727, 732 (6th Cir. 1999) (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992)).

Organizations have standing to assert claims on behalf of members provided that three additional requirements are met. These requirements are "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organizations' purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members." *Hunt v. Washington State Apple Advertising Comm'n,* 432 U.S. 333, 343 (1977); *see also American Federation,* 180 F.3d at 732.

In the context of a summary judgment motion, provided that there is sufficient evidence to create a genuine issue of material fact as to standing, the motion should be denied. *See Bennett v. Spear,* 520 U.S. 154,167 (1997); *Kardules v. City of Columbus,* 95 F.3d 1335, 1346 (6th Cir.

1996). The Court has previously examined standing issues in relation to Defendants' Motion to Dismiss. In the Opinion and Order which resolved that Motion, the Court held that Plaintiffs had presented enough evidence to survive the Motion to Dismiss. (Dkt. Nos. 44 and 45.) Although Defendants have offered subsequent evidence and argument which undermines the credibility of Plaintiffs' position on the standing issue, the Court remains convinced that there are genuine issues of material fact still in controversy. Therefore, for the reasons stated here and the Court's prior rulings, Defendants' Motion for Summary Judgement for Lack of Standing is denied.

IV. Liability for Individual Defendants

The Court has previously considered whether the individual Defendants may be sued in their official capacity. (Opinion and Order Dkt. Nos. 44 and 45.) Individuals who exercise administrative control over an entity which is subject to Title IX liability may be sued in their official capacity. *See generally Smith v. Metro Sch. Dist.*, 128 F.3d 1014, 1020 (7th Cir. 1997). This is because official capacity suits represent another way of pleading an action against the entity represented by the individuals. *Kentucky v. Graham*, 473 U.S. 159, 165 (1985). In this case, there is no question that the MHSAA Representative Council has control over the MHSAA. Therefore, to the extent that the MHSAA is a viable Title IX defendant, so to are the

members of the MHSAA Representative Council. As such, summary judgment is denied.

Conclusion

In 1924, the MHSAA was created by the State of Michigan to regulate interscholastic athletics. Coincident to the passage of Title IX, the MHSAA incorporated itself to operate as a private association, although its functions remained largely the same. Then, in 1995, after the Sixth Circuit's decision in *Horner*, the State of Michigan removed the "official designation" of the MHSAA, though its membership and function again remained unchanged. Since then, the MHSAA has continued to exercise de facto control over interscholastic athletic programs in the state of Michigan.

The various formulations of the MHSAA appear to have been motivated by a desire to avoid the requirements of Title IX and the Equal Protection Clause, not to alter its mission or purpose. Since resolution of Defendants' motions require that this Court not exalt form over substance, and instead inquire into the real and substantial legal acts of the Defendants, their arguments cannot prevail.

DATED in Kalamazoo, MI: /s/ Richard Alan Enslen
January 21, 2000 RICHARD ALAN ENSLEN
Chief Judge

Supreme Court, U.S.
FILED
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(2)

No. 00-99

IN THE

Supreme Court of the United States

MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, *et al.*,
Petitioners,

v.

COMMUNITIES FOR EQUITY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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August 16, 2000

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QUESTION PRESENTED

Whether the Sixth Circuit correctly held that the district court's order denying the Michigan High School Athletic Association's motion for summary judgment neither warrants the extraordinary relief of granting a writ of mandamus nor is an appealable collateral order.

LIST OF PARTIES

The parties to the proceedings below include Respondents Communities for Equity, on behalf of itself, its members, and all those similarly situated; Diane Madsen, on behalf of her minor daughters and all those similarly situated; and Jay Roberts-Eveland, on behalf of her minor daughter and all those similarly situated. The Petitioners are the Michigan High School Athletic Association, on behalf of itself and its members; John Roberts; Keith Alto; Geraldine David; Keith Eldred; Paul Ellinger; Eric Federico; Dan Flynn; Margra Grillo; Robert Grimes; Eunice Moore; Norm Johnson; Dewayne Jones; Dennis Kniola; William Newkirk; Thomas Rashid; Robert Riemersma; Randy Salisbury; Joyce Seals; Michael Shibler; and Christi Brilinski.

TABLE OF CONTENTS

QUESTION PRESENTED i

LIST OF PARTIES ii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 3

I. THERE IS NO FINAL JUDGMENT IN THIS CASE 3

II. THE MHSAA'S ARGUMENTS THAT THERE EXIST CONFLICTS WARRANTING THE GRANTING OF CERTIORARI MUST FAIL 6

CONCLUSION 9

TABLE OF AUTHORITIES

FEDERAL CASES

Brentwood Academy v. Tennessee Secondary School Athletic Ass'n, 180 F.3d 758 (6th Cir. 1999) 8

Cannon v. University of Chicago, 441 U.S. 677 (1979) . . . 7

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) 4, 5

Davis v. Monroe County Board of Education, 526 U.S. 629 (1999) 8

Digital Equipment Corp. v. Desktop Direct, Inc., 511 U.S. 863 (1994) 5

Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) 4

Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251 (1916) 3

Mitchell v. Forsyth, 472 U.S. 511 (1985) 5

National Collegiate Athletic Ass'n v. Smith, 525 U.S. 459 (1999) 7

Soper v. Hoben, 195 F.3d 845 (6th Cir. 1999) 8

Swint v. Chambers County Commission, 514 U.S. 35 (1995) 5

United States v. Florian, 312 U.S. 656 (1941) 3

United States v. MacDonald, 435 U.S. 850 (1978) 4

United States Department of Transportation v. Paralyzed Veterans of America, 477 U.S. 597 (1986) 7

STATE CASES

Kirby v. Michigan High School Athletic Ass'n, 459 Mich. 23 (1998) 6

FEDERAL STATUTES

28 U.S.C. § 1291 . . . . . 3, 4

28 U.S.C. § 1292(b) 3

Section 504 of Rehabilitation Act of 1973, 29 U.S.C. § 794 7

Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 2

STATE STATUTES

Michigan's Elliott-Larsen Civil Rights Act, Mich. Comp. Laws §§ 37.3101 2

OTHER

10A Charles Alan Wright et al., *Federal Practice and Procedure* § 2715 (1998) 3

15A Charles Alan Wright et al., *Federal Practice and Procedure* § 3911 (1992) 5

15B Charles Alan Wright et al., *Federal Practice and Procedure* § 3914.28 (1992) 5

No. 00-99

IN THE

Supreme Court of the United States

MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION ET AL.,
Petitioners,

v.

COMMUNITIES FOR EQUITY ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the petition for writ of certiorari, which seeks review of the Sixth Circuit's holding that the district court's denial of the Michigan High School Athletic Association's motion for summary judgment neither warrants a writ of mandamus nor is an appealable collateral order.

STATEMENT OF THE CASE

On June 26, 1998, Respondents Communities for Equity, a non-profit membership organization of students and parents dedicated to the promotion of gender equity in Michigan secondary school athletics, and parents of two female student-athletes (collectively "CFE"), filed a class action lawsuit

against the Michigan High School Athletic Association and members of its Representative Council (collectively "the MHSAA"). The complaint alleges that the MHSAA discriminates against female students by denying them equal participation opportunities and equal treatment and benefits, including but not limited to: refusing to sanction certain sports that girls want to play; requiring girls to play in non-traditional seasons; and providing inferior athletic facilities for girls' tournaments as compared to those provided for boys' tournaments. CFE alleges that the MHSAA's actions violate Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and Michigan's Elliott-Larsen Civil Rights Act, Mich. Comp. Laws §§ 37.3101 *et seq*. Pet. App. 3-2.

The MHSAA filed renewed motions for summary judgment on September 1, 1999 with respect to the federal claims, stating that it is not covered by Title IX or the Equal Protection Clause. On January 21, 2000, the district court denied the MHSAA's motions, holding that (1) there is a genuine issue of material fact regarding the extent to which the MHSAA exerts control over interscholastic athletics;[1] and (2) the MHSAA is a state actor and thus bound by the Equal Protection Clause. Pet. App. 3-1 to 3-38.

On February 15, 2000, the MHSAA requested a writ of

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[1] The district court accepted CFE's "controlling authority" argument, specifically left open by this Court in *NCAA v. Smith*, 525 U.S. 459 (1999). This argument posits that because Michigan school districts have "ceded control" over interscholastic athletics to the MHSAA, and because interscholastic athletic programs receive federal financial assistance, MHSAA has control over a federally funded educational activity and hence is subject to Title IX. Pet. App. 3-5 to 3-14.

mandamus directing the district court to dismiss the Title IX and Equal Protection Clause claims; alternatively, the MHSAA asked the Sixth Circuit to review the district court's decision pursuant to 28 U.S.C. § 1291. On March 6, 2000, the MHSAA filed a petition with the Sixth Circuit seeking permission to appeal pursuant to 28 U.S.C. § 1292(b). On March 21, 2000, in two separate orders, the Sixth Circuit denied the MHSAA's mandamus petition, its alternative request to construe the petition as a notice of appeal under 28 U.S.C. § 1291, and its permission to appeal pursuant to 28 U.S.C. § 1292(b). Pet. App. 1-1, 2-1. On March 31, 2000, the MHSAA filed a petition with the Sixth Circuit for rehearing *en banc* of both of the court's rulings. On May 16, 2000, the Sixth Circuit denied the MHSAA's petition for rehearing of the mandamus petition and held that "such relief is not available with respect to the denial of the petition for leave to appeal." Pet. App. 1-1.

REASONS FOR DENYING THE WRIT

I. THERE IS NO FINAL JUDGMENT IN THIS CASE

"Except in extraordinary cases, the writ [of certiorari] is not issued until final decree." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). The lack of a final judgment below may "of itself alone" provide "sufficient ground for the denial of the application." *Id.* In this case, the MHSAA concedes that a denial of a motion to dismiss[2] generally is interlocutory in nature and therefore not appealable. *United States v. Florian*, 312 U.S. 656 (1941); 10A Charles Alan Wright et al., *Federal Practice and Procedure* § 2715 (1998). The MHSAA nevertheless argues that the district

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[2] The MHSAA describes the district court's order underlying its petition as a denial of a motion to dismiss, but the district court and Respondents construe the order as a denial of summary judgment. Pet. App. 3-1 to 3-38.

court's decision is an appealable collateral order under 28 U.S.C. § 1291 because the grounds for its summary judgment motion -- that it is not covered by Title IX or the Equal Protection Clause -- are analogous to an immunity claim. Like denials of summary judgment based on immunity, the MHSAA asserts that the denial of summary judgment in this case should be appealable as a collateral order. Its argument cannot prevail.

In *Cohen v. Beneficial Industrial Loan Corp.*, this Court set forth the criteria for when a district court's order is appealable under 28 U.S.C. § 1291: if it falls within the "small class" of decisions that are conclusive, that resolve questions separate from the merits and collateral to rights asserted in the action, and that are effectively unreviewable on appeal from the final judgment in the underlying action. 337 U.S. 541, 546 (1949). The district court's decision in this case does not meet any of these criteria.

First, the district court's order does not decide conclusively whether the MHSAA is subject to Title IX, let alone whether the association has discriminated against female athletes in violation of Title IX and the Equal Protection Clause. The district court merely allowed the case to proceed to trial. Therefore, the decision fails the *Cohen* test, which "disallow[s] appeal from any decision which is tentative, informal or incomplete." *Id.*

Second, the district court's decision does not address questions separate from the merits of the case. CFE's claims that the MHSAA is subject to Title IX and the Equal Protection Clause are part of the claims on the merits and hence are not collateral. *E.g., compare United States v. MacDonald*, 435 U.S. 850, 859-60 (1978) (pretrial denial of speedy trial claim not separable from principal issue of accused's impending trial - his guilt or innocence) *with Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170-72 (1974) (quoting *Cohen*, 337 U.S. at 546-47)

(order requiring defendant to pay costs of notices in class action was "'a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it'"). Moreover, an order is not collateral if it is merely a step towards final judgment in which it will merge. *Cohen*, 337 U.S. at 545-47; 15A Charles Alan Wright et al., *Federal Practice and Procedure* § 3911 (1992). An order denying summary judgment is an interlocutory order that merges in the final judgment; therefore, the district court's decision in this case cannot be characterized as a collateral order. 15B Charles Alan Wright et al., *Federal Practice and Procedure* § 3914.28 (1992).

Third, the district court's denial of summary judgment is reviewable on appeal from the final judgment. After trial is completed in this case, the issues of whether the MHSAA is subject to Title IX and the Equal Protection Clause will be reviewable on appeal along with other claims on the merits. Moreover, the MHSAA's attempt to analogize its claim that it is not covered by Title IX and the Equal Protection Clause to immunity from suit must fail. As this Court stated in *Digital Equipment Corp. v. Desktop Direct, Inc.*, "[Section] 1291 requires courts . . . to view claims of a 'right not to be tried' with skepticism, if not a jaundiced eye" because "virtually every right that could be enforced appropriately by pretrial dismissal might loosely be described as conferring a 'right not to stand trial.'" 511 U.S. 863, 873 (1994). "[T]he essence of . . . immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action." *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985). Unlike an immunity defense, however, the MHSAA's argument that it is not subject to these antidiscrimination laws is a "mere defense to liability," *Mitchell*, 472 U.S. at 526, and "[a]n erroneous ruling on liability may be reviewed effectively on appeal from final judgment." *Swint v. Chambers County Commission*, 514 U.S. 35, 43 (1995) (county commission's assertion that particular

sheriff was not its policymaker and hence could not confer municipal liability did not rank as immunity from suit under Supreme Court's decisions).

Therefore, the district court's order denying the MHSAA's summary judgment motion is not appealable as a collateral order, and there is no final judgment in this case.

II. THE MHSAA'S ARGUMENTS THAT THERE EXIST CONFLICTS WARRANTING THE GRANTING OF CERTIORARI MUST FAIL

The MHSAA contends that the district court's order denying its summary judgment motion and the Sixth Circuit's decision not to hear its interlocutory appeal leave in place a ruling that conflicts with a Michigan Supreme Court decision, four decisions of this Court, and two Sixth Circuit decisions. The MHSAA misstates the holdings of its cited cases in ways that create nonexistent conflicts.

The MHSAA's contention that the district court's order conflicts with the Michigan Supreme Court's ruling in *Kirby v. Michigan High School Athletic Ass'n*, 459 Mich. 23 (1998), is flatly wrong. *Kirby* does not remotely address the issues involved in this case -- i.e., whether a high school athletic association is subject to Title IX and the Equal Protection Clause and whether it discriminates against girls in violation of these laws. Rather, the case involves one school's objection to the MHSAA's decision to declare the school ineligible to participate in a particular tournament. The Michigan Supreme Court, in a *per curiam* opinion, held that "these schools voluntarily cede to the MHSAA full authority to regulate interscholastic athletics" and that "the MHSAA exercised its authority in the course of such governance." 459 Mich. at 36-39. On that basis, the court denied the member school relief. Thus, contrary to the MHSAA's argument in this case, not only

does *Kirby* provide no legal theories that would be applicable to CFE's claims, but the *Kirby* court's reasoning actually supports the "controlling authority" theory that the district court held valid.

With respect to the four purported conflicts with this Court's decisions, the MHSAA's arguments are again misplaced. First, in *National Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459 (1999), this Court held that the NCAA, assuming it receives no federal funds itself, is not subject to Title IX solely by virtue of its receipt of dues from its recipient member schools. 525 U.S. at 469. Importantly, this Court in *Smith* specifically acknowledged and left open the question of whether, "when a recipient cedes controlling authority over a federally funded program to another entity, the controlling entity is covered by Title IX regardless whether it is itself a recipient." *Id.* at 469-70. Therefore, the district court's decision not only does not conflict with *Smith*, but actually addresses an issue that *Smith* specifically stated should be addressed in the first instance by lower courts. *Id.* at 470.

Second, in leaving the "controlling authority" theory open in *Smith*, this Court specifically considered *United States Department of Transportation v. Paralyzed Veterans of America*. 477 U.S. 597 (1986) (addressing issue of whether beneficiary of federal funds is subject to Section 504 of Rehabilitation Act of 1973, 29 U.S.C. § 794 *et seq.*). Moreover, *Cannon v. University of Chicago*, 441 U.S. 677 (1979), which the MHSAA cites as the third conflicting Supreme Court case, certainly is a well-established precedent in Title IX jurisprudence and the *Smith* Court could have discussed it if it thought it was relevant to its decision in that case. Nothing in either *Paralyzed Veterans* or *Cannon* conflicts with this Court's decision in *Smith* to leave open the "controlling authority" theory as a basis for Title IX liability.

Fourth, *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), also does not conflict with the district court's order because it does not address any of the issues raised in this case. *Davis* centered on the question of when a direct recipient of federal funds can be liable in monetary damages for a failure to prevent or stop student-on-student sexual harassment, not on whether an entity is a recipient or is otherwise covered by Title IX.

Finally, the MHSAA also erroneously claims that the district court's decision conflicts with two Sixth Circuit decisions. With respect to the first, this Court has granted certiorari in *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 180 F.3d 758 (6th Cir. 1999), *cert. granted*, 120 S. Ct. 1156 (2000), and if its decision in that case is applicable to the equal protection claim in the instant case, the district court and Sixth Circuit will be bound by it.[3] In addition, the MHSAA twice advanced the same argument with respect to *Brentwood* before the Sixth Circuit in an attempt to appeal the district court's decision, but both times, the Sixth Circuit exercised its discretion not to hear the case. Furthermore, the district court's decision distinguishes *Brentwood* from this case, Pet. App. 3-35, and in any event, the Sixth Circuit will have an opportunity to review the case and *Brentwood*'s applicability if there is an appeal from final judgment. Second, *Soper v. Hoben*, 195 F. 3d 845, 854 (6th Cir. 1999), *cert denied*, 120 S. Ct. 2719 (2000), creates no conflict for the same reason that this Court's decision in *Davis* creates no conflict. In *Soper*, the Sixth Circuit simply applied the *Davis* standard to allegations that a school district mishandled complaints of student-on-student sexual harassment that occurred at federally funded Michigan schools.

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[3] It is important to note, however, that the equal protection claim is not dispositive of the case given the Title IX claim.

Therefore, there are no conflicts that would warrant a grant of certiorari by this Court.

CONCLUSION

For the above stated reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Nº. 00-99

In The

Supreme Court of the United States

IN RE: MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, ET. AL.,
Petitioner,

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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10pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... ii.
DISCUSSION 1
CONCLUSION 6

TABLE OF AUTHORITIES

FEDERAL CASES:

Cureton v. The National Collegiate Athletic Association, 198 F. 3d 107 (3d Cir. 1999) 4

Davis v. Monroe County Board of Education, 526 U.S. 629, 119 S.Ct. 1661, 143 L.Ed. 2d 831 (1999) 4

Digital Equipment Corp. v. Desktop Direct, Inc., 511 U.S. 863, 114 S. Ct. 1992, 128 L.Ed. 2d 842 (1994) 3

National Collegiate Association v. Smith, 525 U.S. 459, 119 S. Ct. 924, 142, L.Ed. 2d 929 (1999) 4

Soper v. Hoben, 195 F. 3d 845 (6th Cir. 1999) 4

STATE CASES:

Kirby v. The Michigan High School Athletic Association, 459 Mich 23 (1998) 5

FEDERAL STATUTES:

20 U.S.C. §1681 2,3,4,5
28 U.S.C. §1291 1,2,3,5
FRCP 21 5

REPLY BRIEF TO RESPONDENTS' BRIEF IN OPPOSITION

DISCUSSION

At the outset, the last two paragraphs of Respondents' "Statement of the Case" are not accurate and may have misleading interpretation. The Respondents' Brief in Opposition at page 2 attempts to summarize the district court's January 21, 2000 Opinion and Order [Appendix 3-1 of Petition] as follows: "(1) there is a genuine issue of material fact regarding the extent to which the MHSAA exerts control over interscholastic athletics; and (2) the MHSAA is a state actor and thus bound by the Equal Protection Clause. Pet. App. 3-1 to 3-38."

Petitioner has requested appellate relief for the very reason that while the district court holds at Appendix 3-23 "The evidence presented reveals a genuine issue of material fact regarding the extent to which the MHSAA exerts control over interscholastic athletic" (giving the illusion that denial of the Motion to Dismiss was interlocutory), that ruling is clearly at odds with the prior paragraph of the same ruling which in fact sets the **law of the case** and forms the foundation for petitioners' contention that the ruling is in fact a conclusive determination and comports with requirements of the collateral order doctrine exception bringing this matter within the ambit of 28 U.S.C. §1291:

> "While the regulation of interscholastic athletics under Michigan statutory law is "non-delegable," the local school districts have delegated it to defendants. Having delegated that duty, the local school districts have now lost the power to control interscholastic athletics independent from the MHSAA."

Does the holding set the **law of the case** as a legal conclusion? The answer is yes.

Does this language describe a genuine issue of material fact for later decision? The answer is no.

Does this language describe a purely interlocutory ruling that may change during the course of trial? The answer is no.

Does the language comport with the requirements of a collateral order qualifying it for review pursuant to 28 U.S.C. §1291? The answer is yes.

Respondents' Brief in Opposition claims that the district court Order does not decide conclusively whether the MHSAA is subject to 20 U.S.C. §1681 (Title IX). Appendix 3-16, paragraph two begins:

> "To resolve this disagreement (of controlling authority) this court . . ."

and proceeds for the next eight pages, including a lengthy footnote, to decide the very issue against the MHSAA and thus set **the law of the case**.

If the MHSAA is within the reach of 20 U.S.C. § 1681 (Title IX) as a conclusion of law, what difference or

relevance are facts that go to the extent of control. In short, no trial is needed as there are no issues of material fact – the Court already has decided the issue conclusively. **The law of the case** has been set and an issue separate from the merits of the discrimination case has been decided and the jurisdictional requirements of 28 U.S.C. §1291 have been satisfied.

Respondents further advance the proposition that Petitioners' 28 U.S.C. §1291 jurisdictional analogy to immunity must fail. Respondents place significant reliance on *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 114 S. Ct. 1992, 128 L.Ed. 2d 842 (1994) to defeat Petitioners' jurisdictional analogy. Respondents' reasoning, however, is misplaced.

First, *Digital Equipment, supra,* is the first case cited by Petitioner in support of its claim of jurisdictional analogy pursuant to 28 U.S.C. §1291. (Petition for Writ page 9).

Second, this Court in *Digital Equipment, supra,* repeatedly stated that the issue surrounding constitutional or statutory provisions entitling a party to immunity from suit are immediately appealable pursuant to 28 U.S.C. §1291. The explicit statutory provision relied upon by Petitioner is 20 U.S.C. §1681 (a) which states as follows:

> "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving federal financial assistance . . ."

The lynch pin required to stand trial on charges of violation of 20 U.S.C. §1681 et. seq. (Title IX) is receipt of federal money. All parties agree that the MHSAA is not a recipient of federal financial assistance.

Notwithstanding the governing legal precedent:

- *National Collegiate Association v. Smith*, 525 U.S. 459, 119 S. Ct. 924, 142, L.Ed. 2d 929 (1999) which holds that only recipients of federal funds fall within the reach of Title IX,

- *Davis v. Monroe County Board of Education*, 526 U.S. 629, 119 S.Ct. 1661, 143 L.Ed 2d 831 (1999) which holds that the federal government's enforcement power under 20 U.S.C. §1681 may only be enforced against funding recipients,

- the Sixth Circuit Court of Appeals holding in *Soper v. Hoben*, 195 F. 3d 845 (6th Cir. 1999), which holds that only recipients of federal funds may be liable under Title IX,

- and the guidance of the reasoning in *Cureton v. The National Collegiate Athletic Association*, 198 F. 3d 107, 118 (3d Cir. 1999) wherein the Third Circuit stated:

> "Furthermore, we cannot understand how the fact that the NCAA promulgates rules and regulations with respect to intercollegiate

athletics somehow means that the NCAA has controlling authority over its members' programs or activities receiving federal financial assistance. After all, the institutions decide what applicants to admit, what employees to hire, and what facilities to acquire;"

- and notwithstanding the Michigan Supreme Court's ruling in *Kirby v. The Michigan High School Athletic Association*, 459 Mich 23 (1998) holding that the MHSAA exercises no independent authority over its member schools,

the trial court concluded as a matter of law that the MHSAA must stand trial on 20 U.S.C. §1681 et. seq. issues. That ruling is clearly erroneous and must be either subject to mandamus under FRCP 21 or be a matter directly appealable pursuant to 28 U.S.C. §1291 on the basis of the referenced statutory provision.

Lastly, Respondents concede (by failure to address the same) that the refusal of the district court to follow binding precedent constitutes a usurpation of judicial authority requiring mandamus. The Sixth Circuit's refusal to act under this circumstance is such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory powers.

CONCLUSION

For the above stated reasons the Petition For Writ of Certiorari should be granted.

Respectfully submitted,

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